

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN McMILLAN,	§	
	§	No. 297, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Kent County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0608002639
Appellee.	§	

Submitted: June 22, 2010
Decided: September 7, 2010

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 7th day of September 2010, upon consideration of the appellant's opening brief, the appellee's motion to affirm, and the Superior Court record, it appear to the Court that:

(1) The appellant, Benjamin McMillan, filed this appeal from the Superior Court's May 5, 2010 summary dismissal of his first motion for postconviction relief. The appellee, State of Delaware, has filed a motion to affirm the Superior Court judgment on the ground that it is manifest on the

face of McMillan's opening brief that his appeal is without merit.¹ We agree and affirm.

(2) In September 2006, McMillan was indicted for seven offenses.² On March 21, 2007, McMillan pled guilty to two of those offenses, namely Trafficking in Cocaine and Tampering with Physical Evidence. In his written plea agreement with the State, McMillan stipulated that he was eligible for habitual criminal sentencing, and he agreed to immediate sentencing. On March 21, 2007, McMillan was declared a habitual criminal and was sentenced to eighteen years at Level V for the trafficking conviction and to an additional two years at Level V suspended for one year at Level IV for the tampering conviction.

(3) On April 12, 2010, McMillan filed a motion for postconviction relief pursuant to Superior Court Criminal Rule 61. As grounds for relief, McMillan alleged that his guilty plea was coerced, that his habitual offender sentence was invalid, and that his counsel was ineffective.

¹ Del. Supr. Ct. R. 25(a).

² The charged offenses were Trafficking in Cocaine, Possession with Intent to Deliver Cocaine, Maintaining a Vehicle for Keeping Controlled Substances, Tampering with Physical Evidence, Possession of Drug Paraphernalia, Resisting Arrest and Possession of Marijuana.

(4) By order May 5, 2010, the Superior Court summarily dismissed McMillan's postconviction motion as "procedurally barred by Superior Court Criminal Rule 61(i)(1), (2), (3), and (4)." This appeal followed.

(5) It appears to the Court that McMillan's claims of a coerced guilty plea and ineffective assistance of counsel are refuted by the record.³ There is no evidence in the record suggesting that McMillan's counsel's performance fell below an objective standard of reasonableness or that, but for counsel's unprofessional errors, McMillan would not have pled guilty but would have insisted on going to trial.⁴ Absent clear and convincing evidence to the contrary, McMillan is bound by the representations he made at the time his plea was entered.⁵ Moreover, McMillan's claims of defects in his sentencing as a habitual offender also are unavailing, as those claims are contradicted by the record and his knowing and voluntarily guilty plea.⁶

(6) It is manifest on the face of McMillan's opening brief that the appeal is without merit. The issues raised on appeal are clearly controlled

³ On the signed guilty plea form, McMillan indicated that he had freely and voluntarily decided to plead guilty, that no one, including his counsel, had threatened him or forced him to enter the plea, that his counsel had fully advised him of his rights in connection with the entry of the plea, and that he was satisfied with his counsel's representation.

⁴ *Albury v. State*, 551 A.2d 53, 58-61 (Del. 1988). The record reflects that by pleading guilty, McMillan, after losing a critical pretrial suppression motion, avoided the possibility of five additional convictions and the imposition of a life sentence.

⁵ *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

⁶ See *Marshall v. State*, 1998 WL 977123 (Del. Supr.) (citing *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997)).

by settled Delaware law. To the extent the issues on appeal implicate the exercise of judicial discretion, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.⁷

BY THE COURT:

/s/ Randy J. Holland
Justice

⁷ See *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (affirming a judgment of the Superior Court on grounds different than those relied upon by the Superior Court).